PP

v.

ROSMAIZOL MOHAMAD

HIGH COURT MALAYA, TEMERLOH
AKHTAR TAHIR JC
[CRIMINAL TRIAL NO: 45-10-2007]
15 OCTOBER 2009

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 440.59 gram cannabis - Possession - Drugs found in car driven by accused - Whether possession proved - Whether accused had possession and control of car - Whether conduct of accused alluded to guilty mind*

The accused was charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 punishable under s. 39B(2) of the same Act. The accused was arrested following information received by SP5 of a drug trafficking by a Malay man driving a Proton Wira car bearing the number plate CBB3755 ('suspected car'). The suspected car had been blocked at the front and rear by cars driven by the police. SP5 had approached the accused to find him lying down with his seat reclined. Upon knocking on the window of the suspected car and producing his (SP5's) authority card, the accused was said to have straightened his chair and attempted to drive off but instead had knocked into SP5's car. SP6, upon seeing that the accused was trying to flee, let off six shots at the tyre of the accused. He had then broken the front window of the suspected car following which the accused had jumped to the back of the car. The accused was then apprehended and a plastic bag suspected to be containing cannabis was recovered under the driver's seat. The drugs were subsequently confirmed as cannabis by the chemist report with a net weight of 440.59 gm. On further investigation, it had been discovered that the suspected car had belonged to SP8 who was in the business of renting out cars. SP8 confirmed that the suspected car had belonged to him and that he had rented out the suspected car to one Mazlan.

Held (discharging and acquitting the accused):

(1) The prosecution succeeded in proving that the accused was found in the suspected car from which the drugs were seized and that he was the only one in the suspected car at the material time. Also, that the drugs seized were the same drugs

A as produced in court. As such, there was no break in the chain in the identity of the drugs. Further, there was no flaw in the findings of the chemist that the drugs were cannabis defined as dangerous drugs under the Dangerous Drugs Act 1952. (paras 13 & 14)

B **(2)** The vital ingredient that needed to be proved for a drug charge to stick was possession and in the present case where the drugs were found in a car, the possession of the car became equally important as the possession of the drugs themselves. (para 15)

C **(3)** The information received by SP5 related to the suspected car and not to the accused. The informant merely mentioned the trafficker to be a Malay man. The other uncontroverted fact was that the suspected car did not belong to the accused but to SP8 who could not identify the accused as having been the D person who rented the suspected car from him. SP8 could, however, confirm that the person who rented the suspected car handed him an identity card and license which bore the name "Mazlan". SP8, however, found out that Mazlan in the identity card was not the person whom he had rented the suspected car E to. The "Mazlan" whose identity card was used in renting the suspected car was traced by the investigating officer and brought to court to testify as SP10. SP10 who confirmed that someone had taken his license could not identify the accused as the person who took the license. SP8 testified that the person who F paid for the rental was a person by the name of Ali. The name Ali was also alluded to in the cautioned statement given by the accused and tendered as a defence exhibit. The investigating officer confirmed that the person Ali existed. As the prosecution was unable to produce that witness in court, an adverse G inference was drawn against the prosecution under s. 114(g) of the Evidence Act 1950 not because the prosecution was suppressing evidence but more so because Ali was material in the narration of events leading to the rental of the suspected car. (paras 16-21)

H **(4)** Although the accused was in control of the suspected car at the material time when the drugs were found, there was no evidence to show when or how he came to be in control of that car. That further alluded to the fact that he might not even have I knowledge of the drugs found under the seat let alone custody or control of the drugs found. (para 22)

(5) The whole case for the prosecution to prove possession of the drugs by the accused apart from the fact that the accused was the sole occupant of the suspected rested on the conduct of the accused. The initial conduct of the accused in trying to drive off could be used against him as having a guilty mind. However, that was not the only inference that could be drawn which was clear from the evidence of the prosecution witnesses themselves. (para 24)

(6) SP5 and SP6 confirmed that the accused showed no emotion when SP5 introduced himself and that the accused just put his seat upright and attempted to drive away. It could well be that the accused who parked the suspected car at the curb thought that the police were asking him to move from that place. The accused's subsequent conduct of jumping to the back of that car could not allude to the fact of a guilty mind as any reasonable man would have done the same in the face of a trigger happy policeman who let off six shots. That was wholly unnecessary as the suspected car was already sandwiched in between two cars. Also unnecessary was SP6's action in shattering the window of that car. The conduct of SP6 was an act of extreme transgression to which even SP5 agreed was unnecessary and the reaction of the accused was that of a normal person in a similar situation. It did not show that the accused had knowledge of the drugs and was trying to escape the police. The court also accepted the explanation by the accused of his state of mind in his cautioned statement. It followed, therefore, that the prosecution failed to prove a *prima facie* case against the accused. (paras 27-31)

Case(s) referred to:
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
Y Jeyamuraly Yesiah v. PP [2007] 5 CLJ 605 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 39B(1)(a), (2)
Evidence Act 1950, s. 114(g)

For the accused - Rozilan Abdul Rahman (Ahmad Nizam Abd Hamid & Nurul Farhana Shamsudin with him); M/s Sazali & Lim
For the prosecution - Mohamad Najmi Daud DPP

Reported by Usha Thiagarajah

A

JUDGMENT

Akhtar Tahir JC:

[1] The accused in this case was charged as follows:

B

> Bahawa kamu Rosmaizol bin Mohamad (K/P: 750328-06-5485) pada 22 Disember 2006, lebih kurang jam 1.45 pagi, berhampiran stesyen Minyak Shell di R&R Temerloh Pahang (Kuala Lumpur - Kuantan) Lebuh Raya Pantai Timur, Dalam Daerah Temerloh, di dalam Negeri Pahang Darul Makmur, didapati mengedar dadah berbahaya iaitu Cannabis sejumlah 440.59 gram, dan dengan itu, kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

C

[2] The sequence of events leading to the arrest of the accused began when C/I Ahmad Yanee bin Nazir (SP5) received information on 21 December 2006 of drug trafficking by a Malay man using a Proton Wira bearing the number plate CBB 3755.

D

[3] On receiving this information SP5 assembled a group of police personnel. After giving a briefing to the police personnel, SP5 and the police personnel proceeded to the location informed by the informer ie, at the R&R at Temerloh - Kuala Lumpur - Kuantan. The police personnel were divided into 3 groups using 3 separate vehicles.

E

F

[4] The first group was to act as a lookout for the said car while the car carrying SP5 would block the suspect's car from the front and the second car would block the suspect's car from the rear.

[5] SP5 was informed at about 1.50am by the lookout car of the entry of the suspect's car bearing the number plate CBB 3755. SP5 then noticed the said car passing by him and he immediately followed. After a while SP5 noticed the suspect's car stopping by the curb at the petrol station.

G

H

[6] SP5 then drove pass the car and blocked the car from the front whereas the second car blocked the car from the rear. SP5 then got out of his car and saw a Malay man at the driver's seat whom he identified as the accused lying down with the seat reclined. SP5 knocked on the window and produced his authority card and flashed it with a torch light. On seeing this, the accused straightened his chair and attempted to drive away but instead knocked into SP5's car which was blocking his car.

I

[7] On noticing the accused trying to flee D/Sgn. Mohmad Zulkifli bin Mat (SP6) let off six shots at the tyre of the accused car. The accused then jumped to the back of the car after SP6 broke the front window of the car. The accused was however apprehended by the police personnel who had blocked the accused car from the rear.

[8] SP5 on searching the car found a plastic packet containing a slab of dried leaves suspected to be cannabis under the driver's seat. The accused and the suspected drugs were brought back to the Mentakab Police Station where SP5 lodged an arrest report, prepared a search list and marked the drug packet.

[9] The accused and the suspected drug packet and the car were then handed to the Investigating officer of this case Insp. Asfanizairul Shafry bin Zainoldin (SP9). On receiving the suspected drugs SP9 kept it under lock and key in his office after which he sent the suspected packet of drugs to the Chemist Khairul Hadi bin Hj Raof (SP4) on 26 December 2006.

[10] SP4 analysed the drugs and after doing all the necessary tests confirmed the plant material to be cannabis as defined under the Dangerous Drugs Act 1952 with a net weight of 440.59gm.

[11] On further investigation SP9 discovered the Proton Wira car bearing number plate CBB 3755 belonged to one Rosli bin Abdullah (SP8) who was in the business of renting out cars. SP8 confirmed that the said car belonged to him and he had rented out the car to a person by the name of Mazlan on 19 December 2006.

Burden Of Proof At The End Of The Prosecution's Case

[12] Considering the sequence of events above leading to the arrest of the accused, the court at the end of the prosecution's case faced the task of determining whether the evidence was sufficient to call upon the accused to enter his defence bearing in mind the burden on the prosecution's case at this stage was to prove its case on a *prima facie* basis.

[13] In this case I had no hesitation in determining that the prosecution had succeeded in proving that the accused was in fact found in the car from which the drugs were seized and he was the only one in the car at that point of time. I was also satisfied that the drugs seized were the same drugs that were produced in court before me in words there was no break in the chain in the identity of the drugs.

[14] I also found no flaw in the evidence of the chemist who had carried out all the necessary tests and the chemist being an expert in his field, I accepted his findings that the drugs found was cannabis, defined as a dangerous drug under the Dangerous Drugs Act 1952.

Possession

[15] The law however requires that for a drug charge to stick, the vital ingredient that needs to be proven is possession and in this case, where the drugs were found in a car, to me the possession of the car becomes equally important as the possession of the drugs itself.

[16] At the outset I noted in this case the information received by SP5 related to this specific car and not to the accused. In the information the informer merely mentioned the trafficker to be a Malay man.

[17] The other uncontroverted fact was that the car did not belong to the accused but to SP8 who could not identify the accused as having being the person who rented the car from him. SP8 could however confirm that the person who rented the car handed him an identity card and license which bore the name of Mazlan.

[18] SP8 however found out when he went to look for the person who rented the car, after the car was not returned on time, that the "Mazlan" in the identity card was not the person whom he had rented the car to.

[19] The "Mazlan" whose identity card was used in renting the said car was traced by the investigating officer and brought to court to testify (SP10). SP10 who confirmed that someone had taken his license could not identify the accused as the person who took the license.

[20] The other thing to note is that SP8 had testified that the person who paid for the rental was a person by the name of Ali. The name Ali was also alluded to in the cautioned statement given by the accused and tendered as a defence exhibit. The Investigating Officer confirmed that the person Ali existed.

[21] The prosecution was unable to produce this witness in court and in my mind this failure of the prosecution was fatal. I invoked the adverse inference against the prosecution under s. 114(g) of the Evidence Act for the non-calling of this witness not because the prosecution was suppressing evidence but more because Ali was material in the narration of events leading to the renting of the said car.

[22] I concluded that although the accused was in control of the car at the material time when the drugs were found there was no evidence to show when or how he came to be in control of the car. This further alludes to the fact that he might not have even the knowledge of the drugs found under the seat let alone custody or control of the drugs found.

[23] For drugs found in a car it is relevant to refer to the case of *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285; at p. 2089 where Edgar Joseph Jr SCJ said as follows:

> Before us, as regards the second ground upon which the trial Judge based his order of acquittal and discharge, it was argued by the learned Deputy, in effect, that because the respondent was, at the material time, the sole occupant of the Honda, which although not owned by him, was in his custody or under his control, consequently, the seven newspaper packages which contained the drugs recovered from the Honda, although not recovered from a specially constructed compartment therein, were, *ipso facto*, or in other words, as a matter of law, also in his custody or control, and therefore there was a case for the respondent to answer regard being had to the provisions of s. 37(d) of the Dangerous Drugs Act 1952, which says:
>
> > 37(d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.
>
> With respect, we considered that that submission went too far and was clearly wrong for reasons we shall state.
>
> In the first place, we would respectfully agree with the proposition of law enunciated by Thomson J (as he then was) in *Tong Peng Hong v. PP* [1955] 1 LNS 165 that a vehicle in which a drug is carried does not *ipso facto* fall within the words "anything whatsoever containing any dangerous drug" and therefore in such a case, the presumption contained in s. 37(d) does not arise.

A Secondly, in the present case, the drug was not found concealed in a specially constructed compartment of the Honda, so that it could, in no way, be deemed to have been so concealed with the knowledge of the owner of the Honda or the person in charge of it at the material time, that is to say, the respondent, by reason of the
B presumption contained in s. 37(h).

Thirdly, having regard to the particular circumstances of the present case, the prosecution had to rely on circumstantial evidence to prove that the respondent had in his custody or under his control the seven packages (six recovered from the plastic bag found in the
C footwell of the rear nearside passenger's seat and one found in the console box, containing in all 578.94 g of heroin) and the six cigarettes containing traces of heroin recovered from the cigarette packet found lying on the dash board.

It is trite law that where the prosecution are relying on
D circumstantial evidence the onus upon it is a very heavy one and that evidence must point irresistibly to the guilt of the accused. If there are gaps in it then that will not be sufficient. (Per Pike CJ in *Chang Kim Siong v. PP* [1967] 1 LNS 18 FC.

Turning to the evidence, although it is true that the respondent was
E the sole occupant of the Honda, being the driver and therefore in charge of it, the fact remains, that he was not its owner and, there was no evidence from which it could be reasonably inferred that he must have been in custody or control of the seven newspaper packages or the cigarette packet, which contained the offending
F exhibits.

In this context, mere knowledge of the presence of the seven newspaper packages or the cigarette packet in the Honda without more would not be sufficient to constitute custody or control thereof though it would constitute an essential step in that direction.
G But the position here was that there was not even proof of such knowledge much less proof of knowledge of the presence of the offending exhibits in the seven newspaper packages or the cigarette packet. For example, there was nothing to indicate for how long in all the respondent had been in charge of the Honda and such evidence as had been adduced indicated that he was seen only
H briefly at the wheel. No evidence was adduced as to whether the seven packages or the cigarette box had been dusted for fingerprints or as to whether the respondent's hand or fingernail clippings were examined for traces of heroin nor was there anything even suspicious about the behaviour of the respondent before or at the time of his
I arrest; for example, he made no difficulties when arrested.

We consider that it would not be an unfair summary of the case for the prosecution against the respondent, on the question whether it was proved that he was in custody or control of the seven packages or the cigarette packet, containing the offending exhibits, if we said that the evidence against him in relation thereto was, essentially, of *juxta* position. It goes without saying that such evidence, which amounts to nothing more than grave suspicion, is totally inadequate for purposes of inferring, control or even custody of the containers concerned, sufficient to attract the presumption under s. 37(d). Accordingly, on this ground alone, the learned Judge was perfectly entitled to rule, and to acquit and discharge him.

Conduct Of The Accused

[24] The whole case for the prosecution in this case to prove possession of the drugs by the accused apart from the fact that the accused was the sole occupant of the car rested on the conduct of the accused. The initial conduct of the accused in trying to drive off could be used against him as having a guilty mind. However to me this was not the only inference that could be drawn and this is clear from the evidence of the prosecution witnesses themselves.

[25] How evidence of conduct can be applied in court is very succinctly stated by His Lordship Mohd Ghazali Yusoff JCA (as His Lordship then was) in the case of *Y Jeyamuraly Yesiah v. PP* [2007] 5 CLJ 605, at p. 625 as follows:

[67] Second, s. 8(2) of the Evidence Act permits the admission of evidence of the conduct of the appellant when it is in reference to a relevant fact in issue, and here it is whether the said conduct of the appellant can imply that the appellant was in possession of the illicit drugs contained in the tin-can.

[68] But having correctly admitted this piece of evidence, it was still necessary for the prosecution to prove to the satisfaction of the court that the appellant was in possession of the illicit drugs contained in the tin-can. This would include proving that he had knowledge that its contents were the illicit drugs. It is my view that the conduct of the appellant in picking up the tin-can and handing it over to SP4 alone did not in any way infer that the appellant was in possession of the illicit drugs. This conduct had to be considered together with the question posed by SP4 to him since it arose from the question asked. They were inter-related. Let me first consider the question posed by SP4 to the appellant to hand over "apa-apa

barang salah" which he had under his custody and control. But "apa-apa barang salah" could mean anything that is "salah". It may not necessarily be in reference to the illicit drugs. It could be anything which is unlawful, such as contraband, pirated or stolen goods. Without specially enquiring about drugs in the question asked then it cannot be conclusively inferred from the appellant's conduct in picking up the tin-can and handing it over to SP4 that he knew that the contents in the tin-can were the illicit drugs. It could be anything which the appellant believed to be unlawful. When more than one inference can be drawn from the response to the question asked then the one which is more favourable to the appellant must be adopted – see *Tai Chai Keh v. Public Prosecutor* [1948] 1 LNS 122; [1948-49] MLJ Supp 105 at p. 108 and accepted by the Federal Court in *PP v. Tan Tatt Eek* [2005] 4 CLJ 460. Therefore, in the circumstances of this case, I find that the conduct of the appellant in response to the question posed by SP4 to him did not imply that he had knowledge that inside the tin-can which he picked and handed to SP4 contained the illicit drugs for which he was charged to be in possession of.

The Act Of Running Away

[69] The next pertinent piece of evidence found by the trial judge which was adverse to the appellant was his running away from the scene of the crime when confronted by the police. But does this action alone provide the only inference that the appellant knew the illicit drugs were in the tin-can? I do not think so and my view is similar to that as illustrated in *Abdullah Zawawi bin Yusoff v. PP* [1993] 4 CLJ 1 where the Supreme Court declares:

> The conduct of the appellant in running away when the discovery of the drugs was announced was consistent with his having known of the presence of the drugs in the box before their discovery, indicating thereby a sense of guilt. On the other hand it was conduct equally consistent with the appellant being in a state of pure panic. An innocent man faced with the prospect of arrest on a capital charge might foolishly react in that way.

[70] Faced with a possible alternative inference. I would have to accept the one which is more favourable to the appellant (see *Tai Chai Keh v. Public Prosecutor (supra)* and in this case it was the possibility that the appellant reacted in panic in the face of being arrested for possession of something unlawful other that the illicit drugs.

[26] In the case of *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, at p. 466 His Lordship Gopal Sri Ram JCA (as His Lordship then was) stated as follows:

> [29] First, the evidence that is relied on by the learned deputy is less than confidence inspiring. The two main pieces of evidence relied on by him are the flight of the respondent from the scene and the finding of the four wrapped packages on his person. But, as pointed out by the learned President of the Court of Appeal (now Chief Justice) to the learned deputy during the course of argument, both these circumstances, even when taken together, do not go to prove trafficking. As to flight, it must be borne in mind is this is not by itself proof of a guilty mind. The point has been made more than once and we find it sufficient to quote the following passage in the judgment of Edgar Joseph Jr. SCJ in *Abdullah Zawawi bin Yusoff v. Public Prosecutor* [1993] 4 CLJ 1:
>
> An innocent man faced with the prospect of arrest on a capital charge might foolishly react in that way. It is true that the appellant himself denied running away but we agree with the judge that the appellant lied on this point, but this does not preclude us from drawing such inferences as may be justified from the evidence adduced by the prosecution. The Jamaican Privy Council case of *DPP v. Brooks* [1974] 2 All ER 840, cited to us by the learned deputy public prosecutor, where the accused, who occupied the driver's seat of a stationary van which contained more than 1000 lbs of ganja, together with several others in the van, scrambled out and ran off, when police officers hurried towards the van, is, therefore, readily distinguishable.

[27] SP5 and SP6 confirmed that the accused showed no emotion when SP5 introduced himself but just put his seat upright and attempted to drive away. It could very well be the accused who had parked the car at the curb thought that the police were asking him to move from the place.

[28] The accused's subsequent conduct of jumping to the back of the car could not in my opinion be alluded to the fact of a guilty mind as any reasonable man would have done the same in face of a trigger happy policeman who let off six shots which were wholly unnecessary, as the accused's car was already sandwiched in between two cars, as was his action in shattering the window of the accused's car.

[29] To me the conduct of SP6 was an act of extreme transgression and to which even SP5 agreed was not necessary and the reaction of the accused was of a normal person in a similar situation and to me it did not at all show that the accused had knowledge of the drugs and was trying to escape from the police.

[30] The accused also explained his state of mind in his cautioned statement which I believe the court is at a liberty to accept.

[31] In the upshot the prosecution having failed to prove a *prima facie* against the accused, I discharged and acquitted the accused on the charge against him.